STATE OF MICHIGAN

COURT OF APPEALS

RICHARD G. ALEXANDER and CAROL ALEXANDER, Plaintiffs/Counter Defendants/Appellants-Cross-Appellees, v EBRAHIM BABAOFF and AZAM BABAOFF, Defendants/Counter Plaintiffs/Appellees-Cross-Appellants.	UNPUBLISHED January 31, 2008 No. 273433 Oakland Circuit Court LC No. 2004-061478-CZ

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

In this suit to quiet title, plaintiffs appeal as of right from a judgment dismissing their claims under the alternative theories of acquiescence and adverse possession. Defendants cross-appeal from this same judgment, by which the court also dismissed their counterclaim for trespass and, on its own motion, awarded plaintiffs a prescriptive easement along a portion of defendants' property. Because we conclude that the trial court did not err in rejecting plaintiffs' claim of title by adverse possession, that the evidence produced at the bench trial in this matter did not support the award of a prescriptive easement, and that the doctrine of acquiescence may not be applied under the facts of this case, we vacate the easement awarded plaintiffs by the trial court and remand this matter for entry of a judgment quieting title to the subject property in favor of defendants.

I. Basic Facts and Procedural History

This case arises from a dispute regarding ownership of a triangular-shaped strip of property lying between the homes owned by the parties along the shore of Gilbert Lake in Oakland County. It is not disputed that the property falls within the legal description of the land conveyed to defendants upon purchase of their home in 1981. Plaintiffs maintain, however, that they have acquired either permissive or prescriptive title to the property as a result of their open and unimpeded possession and use of the land since 1974. In an effort to solidify this claim, plaintiffs filed the instant suit to quiet title to the property under the alternative theories of acquiescence and adverse possession. Denying that plaintiffs had acquired title to the property

by their use or possession, defendants responded to the complaint with a counterclaim for trespass. Both parties subsequently moved for summary disposition under MCR 2.116(C)(10), which was denied by the trial court. The facts established at the subsequent bench trial of the parties' claims can be summarized in the following manner.

Plaintiffs purchased an existing home on Gilbert Lake in 1974. The property on which the home was situated also had an existing backyard pool that was enclosed by a fence. Due to the sloping grade of the property the south end of the pool was raised above the existing grade through the use of a retaining wall. Because of the rise on the side south of the pool and its fencing, access to the lake through plaintiffs' backyard required traversing outside of the pool area. In 1977, a developer commenced development of the property south of plaintiffs' home. As a result of survey markers placed in connection with this development, plaintiffs discovered that the boundary line between their property and that to the south was only 18 inches from the retaining wall of their pool area. Realizing that access to the lake through their backyard might be hampered by the impending development, plaintiffs took deliberate steps to lay claim to a portion of the neighboring land. Their actions included erecting three 12-foot-long sections of split-rail fencing several feet south of their pool area and later improvement of the land commonly referred to throughout the trial as the "disputed property" with plantings and other landscape materials.

In 1981, defendants purchased the land adjoining plaintiffs' property from the developer. The developer had built a house on the property, but at the time of defendants' purchase the property had not been landscaped. After taking ownership of the property defendants completed the landscaping. Defendants maintained at trial that although they were aware of the fence that plaintiffs had placed on their property, they at all times knew that it was on their property and never acknowledged or desired to acknowledge that it represented the boundary line between their properties. Defendants further maintained that they regularly mowed and came onto the disputed property to do landscaping and pruning, and had installed at least one sprinkler head on the disputed property.

At the conclusion of trial, the court entered a judgment dismissing both parties' claims and awarding plaintiffs a prescriptive easement "for ingress and egress around the plaintiffs' elevated pool wall" over a specifically described portion of defendants' property. These appeals followed.

II. Analysis

A. Acquiescence

Before addressing the issues expressly raised by the parties on appeal, we address the applicability of acquiescence under the facts of this case. The doctrine of acquiescence was developed to promote the peaceful resolution of boundary line disputes between adjoining landowners. See *Killips v Mannisto*, 244 Mich App 256, 260; 624 NW2d 224 (2001). There are three distinct ways in which the doctrine, which operates under the principle that a boundary line that has been accepted by the parties should stand, may operate to resolve such disputes: (1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from an intention to deed to a marked boundary. *Walters v Snyder*, 239 Mich App 453, 457; 608 NW2d 97 (2000).

At issue in the present case is acquiescence for the statutory period. In *Kipka v Fountain*, 198 Mich App 435, 438-439; 499 NW2d 363 (1993), this Court explained that this form of acquiescence

> is concerned with a specific application of the statute of limitations to cases of adjoining property owners *who are* ***mistaken*** *about where the line between their property is*. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. [Emphasis added.]

As indicated by the language emphasized above, acquiescence for the statutory period requires that the property owners involved were mistaken concerning the location of their true boundary line. Indeed, consistent with its statement that this embodiment of the doctrine of acquiescence concerns adjoining property owners who are mistaken about the location of their true boundary, this Court expressly held in *Kipka*, *supra* at 439, that the plaintiffs in that case could not establish title to a strip of land on the basis of acquiescence because the record did not "reveal any substantial period of time when the adjoining property owners thought that [a] retaining wall [located along the parties' boundary] was the true boundary line." The mutual mistake found to be absent in *Kipka* and to preclude application of the doctrine of acquiescence is frequently a component in many of the cases involving acquiescence of the type claimed by plaintiffs in this case. See, e.g., *McGee v Ericksen*, 51 Mich App 551; 215 NW2d 571 (1974) (affirming the trial court's finding that there had been no acquiescence in law or fact because the plaintiff's misunderstanding that a fence represented the true property line was merely a unilateral mistake on his part); see also *Walters*, *supra* at 459-460 (applying acquiescence where the adjoining owners were "ignorant of the true location of the boundary line" and mistakenly believed it to be a line of bushes); *Sackett v Atyeo*, 217 Mich App 676; 552 NW2d 536 (1996) (applying acquiescence where the parties shared a driveway and mistakenly treated the center of the driveway as their common boundary when it was not the recorded boundary); cf. *Killips v Mannisto*, 244 Mich App 256; 624 NW2d 224 (2001).[1]

In contrast to these cases, the evidence submitted by the parties both in support of their competing motions for summary disposition and at trial reveals no mistake concerning the location of the true boundary between their properties. To the contrary, the evidence establishes

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[1] In *Killips*, a panel of this Court upheld a claim of acquiescence despite the fact that a mistake in the boundary line was not apparent. However, that case is distinguishable from the instant case as it did not involve a true boundary dispute but rather the use of an easement. See *id*. at 261-262 (Hoekstra, J., dissenting).

that both parties were aware of the true boundary. Indeed, plaintiff Richard Alexander expressly testified and averred that he knowingly placed the fencing alleged to have created the line to which defendants had acquiesced "over the property line" in a deliberate effort to claim title to the land. Defendants also both asserted that they had knowledge of the deeded property line as a result of a survey of their property used by them to install a sprinkling system, including several heads in the disputed area south of plaintiffs' fencing, when they first purchased their home in 1981. Defendant Ebrahim Babaoff additionally indicated that he recognized early on that the split-rail fencing installed by plaintiffs encroached onto his property, but that he permitted the fencing to remain because it did not prevent defendants from traversing or otherwise using the property to north of the fencing, which he considered to belong to he and his wife.

With regard to the issue of mistake, the parties' testimony and averments show that neither party labored under a mistaken belief concerning the location of the true boundary between their properties. Thus, we find that acquiescence for the statutory period is not available as a theory under which plaintiffs may be awarded title to the disputed property.

B. Summary Disposition

We next address the parties' assertion that the trial court erred in denying their competing motions for summary disposition under MCR 2.116(C)(10). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and is properly granted only "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); see also *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

1. Adverse Possession

The trial court properly denied defendants' motion for summary disposition of plaintiffs' claim for adverse possession. "A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years." *Kipka*, *supra* at 439; see also MCL 600.5801. With regard to these requirements, defendants argue that plaintiffs failed to produce any evidence to show that their claimed possession of the disputed property was exclusive. More specifically, defendants argue that plaintiffs' failure to expressly refute their averments regarding installation of a portion of their sprinkling system within the disputed area and use of that land for landscape maintenance purposes precluded any finding that plaintiffs' possession was exclusive. See *Hamilton v Weber*, 339 Mich 31, 53-54; 62 NW2d 646 (1954) (exclusive possession means that the adverse possessor does not occupy the land concurrent with the true owner or share possession in common with the public). Thus, defendants argue, summary disposition of plaintiffs' claim of title by adverse possession was required. We disagree.

While defendants are correct that plaintiffs offered no evidence to expressly refute their averments of possession and use, photographic evidence submitted by both parties in support of

their competing motions clearly showed that plaintiffs had themselves installed fencing, plantings, and other landscape materials within the disputed area north of the fencing. When viewed in a light most favorable to plaintiffs, this evidence also indicates that defendants respected plaintiffs' possession of the disputed area by limiting their own plantings to the undisputed area south of plaintiffs' fencing. In doing so, this evidence objectively supports that plaintiffs claimed a possessory right adverse and hostile to that of defendants, which they exclusively exercised. Defendants' otherwise unsupported averments concerning concurrent use and possession of the land by way of an irrigation system partially installed within the disputed area did not entitle defendants to judgment as a matter of law. To the contrary, the weight and credibility of defendants' averments in light of the photographic evidence submitted by the parties precluded such relief. See *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988) (when the truth of an assertion of material fact depends on the credibility of a witness, a genuine issue of fact exists and summary disposition cannot be granted); see also *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998) ("the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition"). Consequently, the trial court did not err in denying defendants' motion for summary disposition of plaintiffs' claim of title by adverse possession.

2. Trespass

The trial court similarly did not err in failing to grant summary disposition of defendants' trespass claim. Plaintiffs relied on their claim of title to the property as the basis for defending defendants' trespass action. Had plaintiffs succeeded in their suit, defendants' claim for trespass would have failed. See *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995) ("[a]dverse or hostile use is use inconsistent with the right of the owner, use such as would entitle the owner to a cause of action against the intruder' for trespassing"). As already discussed, while plaintiffs could not properly assert title by acquiescence under the facts of this case, there remained a genuine issue of material fact concerning plaintiffs' claim to title by adverse possession. Accordingly, defendants were not entitled to judgment as a matter of law as to their claim of trespass and the trial court did not, therefore, err in denying their motion for summary disposition of that claim in their favor.

B. Judgment following Trial

Plaintiffs argue that the trial court erred in awarding them a prescriptive easement over the disputed property, rather than title to that land under the alternative theories of adverse possession and acquiescence. Defendants likewise assert that the trial court's award of a prescriptive easement was error, but argue that the trial court properly denied plaintiffs' request to quiet title in their favor under the theories advanced in their complaint. Thus, defendants argue, plaintiffs were entitled to no relief. As already discussed, the undisputed facts of this case did not support plaintiffs' claim of acquiescence for the statutory period. Consequently, we do not address the parties' arguments concerning proof of that claim at trial. We agree with defendants, however, that because the evidence presented at trial also did not support an award in plaintiffs' favor under the theories of adverse possession or prescriptive easement, the judgment in this matter must be vacated.

1. Adverse Possession

Plaintiffs assert that the trial court erroneously concluded that they had failed to show the exclusive possession of the disputed property necessary to establish title by adverse possession. See *Hamilton, supra* at 53-54. Specifically, plaintiffs argue that the landscape maintenance found by the trial court to have been conducted on the property by defendants was insufficient to preclude plaintiffs' exclusive possession. We do not agree.

"An action to quiet title is an equitable action, and the findings of the trial court are reviewed for clear error while its holdings are reviewed de novo." *Fowler v Doan*, 261 Mich App 595, 598; 683 NW2d 682 (2004). A trial court's "[f]actual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made." *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

Plaintiffs' assertion that defendants' use and possession is de minimis, and thus insufficient to preclude a finding that their possession was exclusive, fails to recognize that the nature of the acts necessary to constitute possession is dependent on the character of the premises. See *Adair v Bonninghausen*, 305 Mich 137, 143; 9 NW2d 35 (1943). Here, defendants' use and possession of the disputed property solely for landscape maintenance purposes was consistent with the character of that land, which constituted only a side yard bounding plaintiffs' property. Indeed, unlike plaintiffs, defendants held significant frontage along Gilbert Lake and thus did not require the disputed property for access to the lake. Consequently, because there appears to be no significant possessory use to which defendants could reasonably have put the land other than the landscape maintenance purposes relied on by the trial court, we conclude that the trial court did not err in relying on such use to find that plaintiffs had failed to show exclusive possession.

We also reject plaintiffs' assertion that the trial court could not rely on the use claimed by defendants because it found the entirety of their testimony regarding such use to be unbelievable, or at least confused. While the trial court did indicate during its ruling that there appeared to be some "confusion" regarding whether defendant Azam Babaoff regularly mowed in the disputed area and that it did not, therefore, "necessarily believe" her testimony in that regard, there is nothing in its ruling to indicate that it did not find the remainder of defendants' testimony concerning their possession and use of the property incredible. Accordingly, we find no error in the trial court's conclusion that plaintiffs' had failed to establish the exclusive possession necessary to acquire title by adverse possession.

2. Prescriptive Easement

In assigning error to the trial court's award of a prescriptive easement, both parties assert that the court was limited in its remedies by the relief requested by the parties. However, actions to quiet title on the theories raised by plaintiffs, i.e., adverse possession and acquiescence, are equitable in nature. See *Gorte v Dep't of Transportation*, 202 Mich App 161, 165; 507 NW2d 797 (1993). This Court has held that "[t]he shape of relief in equity is not of necessity controlled by the prayer, but is formed by the court according to the germane conditions and equities existing at the time decree is made." *Advance Dry Wall Co v Wolfe-Gilchrist, Inc*, 14 Mich App 706, 712; 165 NW2d 906 (1968); citing *Carlson v Williams*, 348 Mich 165, 168; 82 NW2d 483 (1957). The trial court was therefore free to craft any equitable remedy, including the award of a prescriptive easement, consistent with the applicable law and the evidence presented at trial. See

Mulcahy v Verhines, 276 Mich App 693, 698; 742 NW2d 393 (2007) ("[a]n action for prescriptive easement is equitable in nature"). We agree, however, that the prescriptive easement awarded by the trial court is not supported by evidence presented at trial and cannot, therefore, stand.

An easement signifies the right to use someone else's land for a particular purpose. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 192; 550 NW2d 850 (1996). An easement by prescription results from using another's property in an open, notorious, adverse, and continuous manner for fifteen years. *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679; 619 NW2d 725 (2000). Such an easement does not, however, displace the general possession of the land by its owner, but rather merely grants the holder of the easement qualified possession to the extent necessary for enjoyment of the rights conferred by the easement. See *Morrill v Mackman*, 24 Mich 279, 284 (1872).

The prescriptive easement awarded by the trial court in this matter affords plaintiffs' the right of "ingress and egress around the plaintiffs' elevated pool wall" over a specifically described portion of defendants' property. To award a prescriptive easement for this purpose, the trial court was required to find that plaintiffs had, among other things, continuously used defendants' property near their pool as a point of ingress and egress for the prescriptive period of fifteen years. *Plymouth Canton Community Crier, Inc, supra*; see also *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971) (noting that "continuous use does not mean constant use," and that seasonal use of a pathway to a summer cottage is considered continuous use given that it is "in keeping with the nature and character of the right claimed"). However, while plaintiffs indicated at trial that they sought to claim the subject property in order to ensure access around their pool, no testimony or other evidence that they in fact used the subject property for that purpose was presented at trial.[2] Consequently, any finding of such use by the trial court, without which the easement awarded in this matter cannot stand, was clear error. *Zine*, *supra* at 261.

We therefore vacate the prescriptive easement awarded plaintiffs by the trial court and remand this matter for entry of a judgment quieting title in favor of defendants.[3] We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder

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[2] As argued by defendants on appeal, the absence of such evidence is likely attributable to the fact that neither party in this matter sought to resolve the instant dispute through the award of a prescriptive easement.

[3] Given our resolution of this matter, we need not address the evidentiary claims raised by the parties on appeal.